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No. 95-73

In the

Supreme Court of the United States

October Term 1995

CARGILL, INCORPORATED,
a Delaware Corporation,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has nearly 25,000 supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are

lawyers. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

Attorneys for PLF have participated in numerous cases concerning the issues presented in this case, before this Court and other courts, representing amicus curiae and property owners. Included among these cases are *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *United States v. Lopez*, 514 U.S. ___, 131 L. Ed. 2d 626 (1995); and *Hoffman Homes, Inc. v. Administrator, United States Environmental Protection Agency*, 999 F.2d 256 (7th Cir. 1993).

Amicus seeks to augment the argument in the petition for writ of certiorari. PLF believes that its public policy perspective and litigation experience in support of property rights will provide an additional viewpoint with respect to the constitutional and legal issues presented. Pursuant to Supreme Court Rule 37.2, written permission from all parties to file this brief has been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

This case concerns whether it is any business of the United States government--specifically the Army Corps of Engineers (Corps)--that a property owner digs a ditch on its own property in California. The Corps thinks that petitioner Cargill, Incorporated's (Cargill), property contains "navigable waters" or "waters of the United States" because puddles of rainwater collect in man-made pits and basins on some 12.5 acres during the winter and spring. The Ninth Circuit agreed.

The property in question is located southeast of San Francisco, part of a 153-acre tract of land that was used by Cargill's corporate predecessor, the Leslie Salt Company, for the manufacture of salt. The previous owner of the land, sometime around 1919, began constructing facilities used for salt manufacture, including pits to hold calcium chloride and basins known as salt chrystallizers that are used in the last stage of production. *Leslie Salt Co. v. United States*, 700 F. Supp. 476, 479-80 (N.D. Cal. 1988) (*Leslie Salt I*), Petition for Writ of Certiorari (Pet.) at A-61. The chrystallizers were shallow basins with compacted, watertight soil. These facilities were used to make salt until 1959, when the operations were discontinued as uneconomical and ceased but for brief times in 1962 and 1968. *Id.* at 480, Pet. at A-62. Seeking to make some use of the property it owns, in 1985 Leslie Salt started to dig a feeder ditch and siltation pond on a portion of the property, discharging fill in the process. The Corps caught wind of this and issued a cease and desist order under the Clean Water Act (CWA), 33 U.S.C. § 1251, *et seq.*

The Corps claimed that Leslie Salt needed a permit under Section 404(a) of the CWA, 33 U.S.C. § 1344(a), for "the discharge of dredged or fill material into the navigable waters" of the United States. 33 U.S.C. § 1344(a); *see Leslie Salt Co. v. United States*, 55 F.3d 1388, 1391 (9th Cir. 1995) (*Leslie Salt IV*), Pet. at A-2. A similar controversy arose in 1987 when Leslie Salt attempted to place fill on its land to block a culvert. *Leslie Salt Co. v. United States*, 896 F.2d 354, 356 (9th Cir. 1990) (*Leslie Salt II*), Pet. at A-41. Leslie Salt filed a lawsuit challenging the Corps' jurisdiction, the Corps filed an enforcement action as a countersuit, and the District Court determined the Corps had no jurisdiction over petitioner's land. *Id.*, Pet. at A-42.

The Ninth Circuit reversed, holding that the facts that the puddles collected in artificial areas and were of a temporary duration were of no consequence to the Corps' jurisdiction. *Leslie Salt II*, 896 F.2d at 361; Pet at A-51. The Corps had argued that petitioner's land contained "waters of the United States," as defined in a Corps regulation to include "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3) (1989), Pet. at A-93. The Corps interprets the regulation to extend to any waters "[w]hich are or would be" used as habitat by migratory birds which cross state lines or as habitat for endangered species. 51 Fed. Reg. 41,206, 41,217 (1986), Pet. at A-94. The Ninth Circuit in *Leslie Salt II* determined that the potential habitat connection is a sufficient connection to interstate commerce for the purposes of satisfying the regulation and establishing congressional authority under the Commerce Clause. U.S. Const. Art. I, § 8, cl. 2. *See Leslie Salt II*, 896 F.2d at 360, Pet. at A-50-51.

On remand, the District Court found that 12.5 acres of petitioner's land contained puddles under the Corps' jurisdiction, being connected with interstate commerce due to the use of the puddles by some 55 species of birds. *Leslie Salt IV*, 55 F.3d at 1392, Pet. at A-5 (citing *Leslie Salt Co. v. United States*, 820 F. Supp. 478 (N.D. Cal. 1992) (*Leslie Salt III*)). On appeal once again, the Ninth Circuit upheld this determination, accepting the argument that the use of land by migratory birds makes that land subject to the powers of Congress over interstate commerce. *Leslie Salt IV*, 55 F.3d at 1394-96, Pet. at A-9-14. Because the Commerce Clause power cannot reach such land, because the intent of Congress was not to reach such land, and because

the rule defining such land to contain "waters of the United States" was not properly adopted, the Ninth Circuit was wrong. Its ruling creates a general police power where none exists for the federal government under the United States Constitution. This ruling conflicts with Supreme Court precedent and raises important issues of federal law that should be resolved by this Court.

SUMMARY OF ARGUMENT

The Ninth Circuit has acquiesced in the extension of federal power far beyond that granted under the Commerce Clause. In upholding the "migratory bird rule," it has failed to employ the scrutiny required by this Court in its recent *Lopez* decision. The Ninth Circuit's ruling in effect creates a general federal police power under which federal officers can regulate puddles of water on private property based on the possibility that a bird might bathe there. Activities involving such puddles cannot have a substantial effect on interstate commerce.

The court below also failed to follow this Court's determinations in the *Riverside* case that the purpose of the Clean Water Act was to control pollution, not to provide recreational opportunities for birds. Finally, the Ninth Circuit looked the other way when confronted with a substantive rule adopted without the required public notice and comment. The Ninth Circuit decision potentially extends federal regulatory power over every piece of private land in this country and should be reviewed by this Court.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I

CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE DOES NOT EXTEND TO THE REGULATION OF ISOLATED INTRASTATE PUDDLES

Just last term, this Court in *United States v. Lopez*, 131 L. Ed. 2d 626, began to rein in the abuses of the commerce power justification for acts of Congress. This Court officially adopted as the "proper test" of asserted regulatory authority a required "analysis of whether the regulated activity 'substantially affects' interstate commerce." *Lopez*, 131 L. Ed. 2d at 637. The Ninth Circuit in *Leslie Salt II* did not employ this analysis, and instead assumed that "local waters which may provide habitat to migratory birds and endangered species" are subject to Corps' jurisdiction under the Commerce Clause. 896 F.2d at 360, Pet. at A-50. In *Leslie Salt IV*, the Ninth Circuit refused to disturb this prior ruling, on the basis that it was not "clearly erroneous." 55 F.3d at 1396, Pet. at A-14.

Like *Lopez*, this case involves the regulation of an activity for which no "substantial effect [on interstate commerce] was visible to the naked eye." *Lopez*, 131 L. Ed. 2d at 640. Jurisdiction over puddles that are not connected nor even near rivers, streams, creeks, or other bodies of water that the Clean Water Act obviously sought to protect was justified by the Ninth Circuit on the basis that birds

might frolic in these puddles. Only human beings connected with the property owner have access to these puddles. No hunters, photographers, or other sportsmen come to traipse through these puddles. *Leslie Salt IV*, 55 F.3d at 1396, Pet. at A-14. Yet, they are subject to Congress' Commerce Clause power--because of the birds.

What possible effect, let alone a substantial effect, on interstate commerce could result from placing dirt where these puddles form? Will one fewer puddle for birds to bathe in have some impact on the market for these birds? Is the placement of fill in such puddles the sort of "economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce"? *Lopez*, 131 L. Ed. 2d at 642-43. Does the presence of such puddles have any appreciable impact on commerce, given the numerous other bodies of water and even puddles available to these birds? In this particular case, the birds have rather nice accommodations nearby--the San Francisco Bay National Wildlife Refuge. *Leslie Salt IV*, 55 F.3d at 1390, Pet. at A-2. The *Lopez* case made plain that such tenuous connections to interstate commerce should be carefully probed by the courts. 131 L. Ed. 2d at 641-43.

If the commerce power extends over puddles in which a bird might bathe, is there any limit to what Congress can regulate? Is the color of houses the next subject, since certain colors might deter birds from an otherwise cozy resting spot? Will the federal government regulate all noise levels on private property, since such decibel disturbances could affect the migrating birds? The parade of absurdity could go on and on, and at its head is this notion that isolated puddles cannot be disturbed by their "owners" without federal permission. Just like in *Lopez*, "[t]o uphold the Government's contentions here, [the Court] would have to pile inference upon inference in a manner that would bid fair

to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." 131 L. Ed. 2d at 643.

The Ninth Circuit relied upon *Hughes v. Oklahoma*, 441 U.S. 322, 329-36 (1979), a case dealing with the interstate transportation of minnows, for the proposition that Commerce Clause power extends to the regulation of *potential* habitat of migratory bird or endangered species because Congress has Commerce Clause power over wildlife. *Leslie Salt II*, 896 F.2d at 360, Pet. at A-50-51. This is a seriously distorted gloss on *Hughes* that fails to put that case in its proper context--which was the ability of a state to impede interstate commerce in animals. *Hughes* has nothing to do with the question of whether or not all potential *habitat* for wildlife falls under federal Commerce Clause jurisdiction. *Hughes* merely found that once wildlife enters the stream of commerce (which usually occurs after killing or capture) a state cannot place burdens upon interstate commerce unless the traditional Commerce Clause burden tests are met. *Hughes*, 441 U.S. at 336.[1]

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[1] For a time there existed the belief fostered in the Nineteenth Century that once wild animals were reduced to possession, states retained some sort of title in those animals, and could prevent their introduction into interstate commerce. *See Geer v. Connecticut*, 161 U.S. 519, 530 (1896). As discussed in *Hughes*, this principle was eroded over time. In *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977), it was noted that a state's "title" over game animals was an anachronistic concept and could not be used by a state to discriminate against out-of-state fishermen. *See Hughes*, 441 U.S. at 334-35. Finally, in *Hughes* the controversy was put to rest: A state's interest in its wildlife and natural resources was not sufficient justification, *a fortiori*, for placing a burden upon interstate commerce. *Hughes*, 441 U.S. (continued...)

The proper test for determining whether a statute fits under the auspices of the Commerce Clause was outlined in *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981):

> A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.[2]

There is no showing whatsoever in the legislative history of the Clean Water Act that land use activities on isolated waters and wetlands affect interstate commerce. Congress nowhere found that the viability of migratory waterfowl or endangered species populations is dependent upon the preservation of such isolated wetlands. As explained in Argument II, *infra*, there is no indication that Congress even considered protection of migratory birds under this Act. Therefore, there is no rational basis to support the suggestion that the regulated activity of filling isolated puddles of water *substantially* affects interstate commerce. The second prong of the *Hodel* test is likewise suspect because the nexus between interstate commerce in migratory birds and wildlife has not been shown to be connected, reasonably or otherwise, to a permitting program on isolated

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[1] (...continued)
at 336. *But see* dissenting opinion of Chief Justice Burger and Justice Rehnquist in *Hughes*, 411 U.S. at 339-46 (*Geer* remains good law because the "ownership" theory is shorthand for a state's strong interest in conserving its resources).

[2] Obviously, *Lopez* has made clear that the effect on interstate commerce must be "substantial." 131 L. Ed. 2d at 637.

waters and wetlands. These isolated waters and wetlands have not been shown to contain significant reservoirs of animal habitat--and certainly have not been shown to be more habitable than any other area of thoroughly dry land.

Thus, even if Congress had intended to extend the reach of its jurisdiction to isolated waters, that reach would violate the limits of the Commerce Clause. This Court should grant the petition for writ of certiorari and settle the matter of whether the activity of placing fill in intrastate puddles substantially affects interstate commerce.

II

THE AGENCIES AND THE COURT BELOW HAVE EXTENDED THE SCOPE OF THE CLEAN WATER ACT BEYOND THAT INTENDED BY CONGRESS

Even if the Commerce Clause power extends to federal regulation of isolated wetlands, the assumption that Congress intended to regulate to the full extent of its Commerce Clause powers under the Clean Water Act is itself incorrect. The Corps and the Environmental Protection Agency (EPA)[3] have abandoned the express intent of Congress.

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, this Court concluded that the Clean Water Act in general and Section 404(a) in particular were intended by

[3] The EPA has adopted an identical definition for "'waters of the United States.'" *See Hoffman Homes, Inc. v. Administrator*, 999 F.2d 260; *Leslie Salt IV*, 55 F.3d at 1394 n.2; Pet. at A-9 n.2.

Congress to combat the problem of water pollution.[4] *Id.* at 132. In its first look at this case, the Ninth Circuit failed to consider this Court's interpretation of Clean Water Act Section 404(a) as stated in *Riverside*. Instead, the court decided that the "waters" at issue were subject to Section 404(a), not because of the potential to cause water pollution, but solely due to the possibility that migratory birds might use the property. *Leslie Salt II*, 896 F.2d at 360, Pet. at 50-51. In its most recent consideration of this issue, the Ninth Circuit attempted to use *Riverside* to justify its approach, citing the connection between adjacent wetlands and the lifestyles of aquatic species and making the big leap of concluding that migratory birds are somehow in an analogous situation. *Leslie Salt IV*, 55 F.3d at 1395, Pet. at A-11-12 (admitting that this constitutes at best "some support" for the Corps' position).

In light of this Court's *Riverside* opinion, to the extent that the Ninth Circuit attempted to employ the two-step approach for analyzing agency interpretations of statutes as announced in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984),[5] its conclusions contradict those of this Court. This Court

[4] In *Riverside*, this Court said that any definition of "waters" subject to Section 404(a) must consider "the realities of the problem of water pollution that the Clean Water Act was intended to combat." *Riverside*, 474 U.S. at 132.

[5] In *Chevron*, the two-step approach referred to is: (1) if Congress has directly spoken to the precise question at issue, and Congress' intent is clear, the court must give effect to that intent; (2) if the statute and its legislative history are silent or ambiguous with respect to the specific issue, then the question for the court is whether the agency's interpretation is based on a permissible construction of the statute.

specifically stated that Congress intended "to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside*, 474 U.S. at 133. Thus, this Court found that Congress invoked *powers* under the Commerce Clause, but this Court did *not* rule that Congress invoked *all* its power under the Commerce Clause, as the Ninth Circuit held. A comprehensive reading of the legislative history indicates that Congress intended to regulate only water connected with *waterborne* commerce.[6]

In *Riverside*, this Court found that extending Corps' jurisdiction beyond open water to adjacent wetlands was reasonable due to the "evident breadth of congressional concern for protection of water quality," and the interrelated nature of navigable waters and adjacent wetlands. 474 U.S. at 133. Contrarily, the Corps has never shown that putting clean fill dirt in "other waters," namely isolated crystallizers and calcium chloride pits containing rainwater, impacts water pollution in any manner. Clearly, these waters do not connect hydrologically to any other water body. *Leslie Salt IV*, 55 F.3d at 1395, Pet. at A-12. Rather, the Corps asserts that these isolated "waters," which remain dry land most of the year, and other isolated wetlands must be protected as

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[6] *See* Jackson and Nitze, *Wetlands Protection Under Section 404 of the Clean Water Act--The Riverside Bayview Decision, Its Past and Future*, 7 PUB. LAND L. REV. 21, 33 (1986). (Congress intended to limit Corps' jurisdiction to "all waters covered by the expanded judicial interpretations of [navigable waters], but no others.")

potential habitat or open space for wildlife pursuant to the Clean Water Act.[7]

The decision below holds that Corps' jurisdiction over an isolated "water" is reasonable due solely to migratory bird use--without any effect on water quality. Congress' clear intent was to grant the Corps' authority to combat water pollution; Congress never intended that mere use by migratory birds be used as the surrogate to extend Corps regulatory power to any wet area. Thus, the decision below violates this Court's admonition that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

III

THE MIGRATORY BIRD RULE IS A SUBSTANTIVE RULE IMPOSED IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

The court below upheld the Corps' definition of "waters of the United States," 33 C.F.R. § 328.3(a)(3), despite the failure of the Corps to promulgate the rule via

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[7] The Corps asserts this despite the fact that as recently as 1985, the Corps' civilian supervisor told Congress that: "One significant point to recall is that the Congress did not design Section 404 to be a wetlands protection mechanism and it does not function well in that capacity." Testimony of Robert K. Dawson, Assistant Secretary of the Army for Civil Works, Section 404 of the Clean Water Act: Oversight Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works, 99th Cong., 1st Sess. 61 (1985).

notice and comment as required by the Administrative Procedure Act, 5 U.S.C. § 553. *Leslie Salt IV*, 55 F.3d at 1393-94, Pet. at A-8-10. The court tied its own hands in making this determination, under the cover of the "law of the case" doctrine. *Id.* As a result, the Ninth Circuit found it "plausible" that the definition was an interpretive rule rather than a substantive one, despite the fact that the definition by its very nature determines the scope of the Corps' power and jurisdiction. 55 F.3d at 1394, Pet. at A-10. Given the tremendous impact of such a rule on the rights of property owners throughout the country--whose lands can be regulated by the federal government if they contain puddles that birds might find attractive, there can be no doubt that the Corps' action extending its regulatory authority to isolated puddles of water is "one 'affecting individual rights and obligations.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (quoting *Morton v. Ruiz*, 415 U.S. 199, 232 (1974)). This Court should grant the petition for writ of certiorari to review the propriety of this rule.[8]

CONCLUSION

The federal commerce power is the power to regulate *interstate commerce*. This Court has held that a substantial affect on such commerce must be shown to justify assertions of congressional regulatory power. The asserted connection of puddles of water to migratory birds to interstate commerce

[8] Although brushed aside by the court below, *see Leslie Salt IV*, 55 F.3d at 1396 n.3; Pet. at A-14 n.3, the adoption of the migratory bird rule raises serious questions under the nondelegation doctrine. *See Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 672-76 (1980) (Rehnquist, J., concurring).

is illusory. Congress passed the Clean Water Act not for the convenience of birds, but to control pollution. The Ninth Circuit's decision in *Leslie Salt IV* allows the Army Corps of Engineers to make a federal case out of every piece of sand placed in any puddle in America. This decision is contrary to the Constitution and the laws of this nation. Amicus curiae urges this Court to grant the petition for writ of certiorari and rein in this source of certain regulatory abuse.

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Respectfully submitted,

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